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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 JAE JEONG LYU,  
12 Petitioner,

13 v.

14 SUPERIOR COURT OF  
15 CALIFORNIA,  
16 Respondent.  
17

Case No. 2:23-cv-08912-JVS-KES

ORDER TO SHOW CAUSE WHY  
PETITION SHOULD NOT BE  
DISMISSED AS UNTIMELY OR  
LACKING JURISDICTION

18  
19 I.

20 INTRODUCTION

21 On October 17, 2023, Jae Jeong Lyu (“Petitioner”) constructively filed a  
22 Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28  
23 U.S.C. § 2254. (“Petition” at Dkt. 1.)<sup>1</sup> The Petition challenges Petitioner’s  
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25 <sup>1</sup> October 17, 2023 is the date Petitioner signed the Petition. (Dkt. 1 at 11.)  
26 The Court assumes, for purposes of this order, that Petitioner is entitled to the  
27 benefit of the prison mailbox rule, under which “a prisoner’s pro se habeas petition  
28 is deemed filed when he hands it over to prison authorities for mailing to the  
relevant court.” Campbell v. Henry, 614 F.3d 1056, 1058-59 (9th Cir. 2010)  
(citation omitted); see also Butler v. Long, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014)

1 convictions for crimes against Trish B. and Vanessa S.

2 Rule 4 of the Rules Governing Section 2254 Cases in the United States  
3 District Courts requires the district court to dismiss a habeas petition “[i]f it plainly  
4 appears from the petition and any attached exhibits that the petitioner is not entitled  
5 to relief in the district court...” Under this rule, district courts are “permitted, but  
6 not obliged, to consider, sua sponte, the timeliness of a state prisoner’s habeas  
7 petition.” Day v. McDonough, 547 U.S. 198, 202 (2006). “[B]efore acting on its  
8 own initiative, a court must accord the parties fair notice and an opportunity to  
9 present their positions.” Id.

10 For reasons discussed more fully below, the Court orders Petitioner to show  
11 cause why the Petition should not be dismissed as (1) untimely or (2) filed when  
12 Petitioner was no longer “in custody” under one of the state court judgments he is  
13 challenging, meaning the Court does not have jurisdiction under § 2254.

## 14 II.

### 15 BACKGROUND

16 The following facts are taken from the Petition, from the Court’s own  
17 records, or from public records. Where necessary, the Court takes judicial notice of  
18 the latter. See Fed. R. Evid. 201(b)(2) (“The court may judicially notice a fact that  
19 is not subject to reasonable dispute because it ... can be accurately and readily  
20 determined from sources whose accuracy cannot reasonably be questioned.”);  
21 United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (“[A] court may take  
22 judicial notice of its own records in other cases, as well as the records of an inferior  
23 court in other cases.”).<sup>2</sup>

24  
25 \_\_\_\_\_  
26 (noting that, in the absence of other evidence, courts generally deem a habeas  
petition filed on the day it is signed).

27 <sup>2</sup> The Court has issued a separate minute order attaching any public records  
28 referenced in this order that are not available on Lexis.

**A. Petitioner’s Convictions Involving Trish B.**

**1. Convictions and Direct Appeal.**

Petitioner worked as a massage therapist. In March 2011, in Los Angeles County Superior Court (“LASC”) case no. BA372280, Petitioner was convicted of two felony counts (sexual penetration by a foreign object of an unconscious person and oral copulation of an unconscious person) and two misdemeanor counts (sexual battery) arising out of his 2009 sexual assault of a massage client, Trish B. People v. Lyu, 203 Cal. App. 4th 1293, 1295 (2012); People v. Lyu, No. B283089, 2018 Cal. App. Unpub. LEXIS 437, 2018 WL 495167 (Jan. 22, 2018).

In 2012, the California Court of Appeal reversed Petitioner’s felony convictions because Trish B.’s trial testimony established that she was not “unconscious” during the assault. But the Court of Appeal affirmed Petitioner’s two misdemeanor convictions. See People v. Lyu, 203 Cal. App. 4th 1293 (2012) (appellate case no. B232192); see also Lyu, B283089, 2018 Cal. App. Unpub. LEXIS 437, 2018 WL 495167. On June 13, 2012, the California Supreme Court denied Petitioner’s petition for review. People v. Lyu, No. S201853, 2012 Cal. LEXIS 5445 (June 13, 2012).

“Following the appeal, [Petitioner] was sentenced on [the] two misdemeanors for a term of one year.” People v. Lyu, No. B306835 (Cal. Ct. App. Oct. 1, 2020) (order dismissing later appeal).

**2. Postconviction Proceedings.**

It appears that Petitioner was released from custody in 2012. See Lyu, No. B283089, 2018 Cal. App. Unpub. LEXIS 437, 2018 WL 495167. After he was convicted of new crimes against Vanessa S. in 2015—as discussed further below—he began to file new challenges to all of his convictions, including those involving Trish B.

Between 2015 and 2017, he filed multiple unsuccessful postconviction challenges to the Trish B. convictions in state court. People v. Lyu, LASC Case

1 No. BA372280 (docket showing habeas petition was filed on January 25, 2016);  
2 People v. Lyu, No. B268379 (Cal. Ct. App. Dec. 2, 2015) (denying habeas  
3 petition); People v. Lyu, No. B283993 (Cal. Ct. App. Aug. 2, 2017) (denying  
4 petition for writ of error coram nobis).

5 In 2017, Petitioner filed a petition in the LASC seeking records from the  
6 Trish B. trial, stating that he intended to use them to challenge the requirement that  
7 he register as a sex offender. The LASC denied the petition, and Petitioner  
8 appealed. The California Court of Appeal affirmed the denial. Lyu, No. B283089,  
9 2018 Cal. App. Unpub. LEXIS 437 2018 WL 495167. Petitioner sought review by  
10 the California Supreme Court, which summarily denied review. People v. Lyu, No.  
11 S247256, 2018 Cal. LEXIS 2886 (Apr. 11, 2018).

12 In 2020, Petitioner filed several motions in the LASC case involving Trish  
13 B., which the California Court of Appeal summarized as follows:

14 On February 5, 2020, [Petitioner] filed motion to vacate  
15 judgment pursuant to Penal Code sections 1473.6 and 1473.7. At the  
16 time of his motions, [Petitioner] was serving a sentence of seventeen  
17 years on an unrelated case [the case involving Vanessa S., discussed  
18 below]. On February 24, 2020, the court denied the 1437.6 motion  
19 because [Petitioner] did not offer newly discovered evidence and  
20 denied the 1473.7 motion because [Petitioner] was not claiming  
21 adverse immigration consequences.

22 On March 27, 2020, [Petitioner] filed a motion for  
23 reconsideration of the motion to vacate the conviction. The superior  
24 court appears to have treated the motion as a petition for a writ of  
25 habeas corpus and denied the motion or petition on June 17, 2020  
26 because [Petitioner] was no longer in custody for these misdemeanor  
27 offenses.

28 People v. Lyu, No. B306835 (Cal. Ct. App. Oct. 1, 2020).

Petitioner appealed, and the California Court of Appeal dismissed the appeal, finding that: (a) if the latter motion was a habeas petition, “there is no appeal from an order denying a petition for a writ of habeas corpus” under California state law, and (b) if it was a motion for reconsideration, it was untimely under California state law. Id.

**B. Petitioner’s Convictions Involving Vanessa S.**

**1. Convictions and Direct Appeal.**

In 2015, in LASC case no. BA439082, Petitioner was charged with four crimes arising out of a sexual assault on another massage client, Vanessa S.: sexual battery involving an unconscious person, forcible sexual penetration, forcible oral copulation, and failing to register as a sex offender. After a jury convicted him of all four charges, the trial court sentenced him to a total term of 17 years. People v. Lyu, No. BA439082 (LASC minutes).

Petitioner appealed. On June 6, 2017, the Court of Appeal reversed Petitioner’s conviction for forcible sexual penetration based on the trial court’s failure to instruct the jury on lesser included offenses. But it affirmed his other three convictions. People v. Lyu, No. B272022, 2017 Cal. App. Unpub. LEXIS 3903, 2017 WL 2438276 (June 6, 2017). On August 9, 2017, the California Supreme Court denied Petitioner’s petition for review. People v. Lyu, No. S242553, 2017 Cal. LEXIS 6434 (Aug. 9, 2017).

On October 18, 2017, the LASC resentenced Petitioner to a total term of 12 years in state prison followed by 6 months and 364 days in county jail. (Dkt. 1 at 10); People v. Lyu, No. BA439082 (LASC minutes).

On October 30, 2017, Petitioner appealed his resentencing. See People v. Lyu, No. B286037 (Cal. Ct. App). That appeal ended on September 26, 2018, because Petitioner voluntarily dismissed it. Id.

**2. Postconviction Proceedings.**

In 2016, while his direct appeal was pending, Petitioner filed two

1 unsuccessful pro se cases in the California Court of Appeal. People v. S.C.L.A.,  
 2 No. B269920 (Cal. Ct. App. Feb. 3, 2016) (denying writ of prohibition); In re Lyu,  
 3 No. B278828 (Cal. Ct. App. Nov. 9, 2016) (denying habeas petition).

4 It appears that, throughout 2016, 2017, and 2018, he also filed multiple  
 5 petitions or motions in the LASC. On November 29, 2018, he filed a habeas  
 6 petition and/or motion for new trial in the LASC. People v. Lyu, No. BA439082  
 7 (LASC minutes). On December 10, 2018, the LASC denied the petition, finding it  
 8 “restate[d] the same facts and basis as presented previously” in motions filed on  
 9 “11-16-16, 1-4-17, 7-10-17, 8-21-17, 9-22-17, 8-21-18, 10-17-18, [and] 11-26-18.”  
 10 Id.

11 On January 30, 2019, Petitioner filed a motion in the LASC to “modify” the  
 12 court’s transcripts. Id. On February 6, 2019, the LASC denied the motion, finding  
 13 that the request was successive and had been denied previously. Id.

14 Petitioner appealed that denial, and on March 14, 2019, the California Court  
 15 of Appeal dismissed the appeal because the LASC’s denial order was not  
 16 appealable. People v. Lyu, No. B296054 (Cal. Ct. App. Mar. 14, 2019).

17 On March 27, 2019, Petitioner filed a habeas petition in the California Court  
 18 of Appeal, which denied it on April 5, 2019. In re Lyu, No. B296543 (Cal. Ct.  
 19 App.).

20 On June 26 and July 9, 2019, Petitioner filed two petitions for writ of  
 21 mandate in the LASC. People v. Lyu, No. BA439082 (LASC minutes). On July 9,  
 22 2019, the LASC denied the petitions as successive. Id.

23 On June 22, 2023, Petitioner filed a habeas petition in the LASC. Id. On  
 24 July 17, 2023, the LASC denied the petition but entered an amended abstract of  
 25 judgment on July 21, 2023, to correct a scrivener’s error. Id.

26 On August 8 and 15, 2023, Petitioner filed two letters with the LASC entitled  
 27 “re: habeas corpus” and “reconsideration.” Id. On August 29, 2023, the LASC  
 28 summarily denied the motions, noting they were “repetitive, successive, and

1 without merit.” Id.

2 On August 16, 2023, Petitioner filed a habeas petition in the California Court  
3 of Appeal, which denied it on August 23, 2023. In re Lyu, No. B331011 (Cal. Ct.  
4 App.).

5 On September 14, 2023, Petitioner filed a motion in the LASC to “modify  
6 the court’s sentencing order and ... release [him] based on wrongful conviction...”  
7 People v. Lyu, No. BA439082 (LASC minutes). The LASC denied the motion on  
8 September 15, 2023. Id.

9 On September 27, 2023, the LASC noted that it had “received an  
10 unintelligible letter” from Petitioner on that date, and it forwarded the letter to  
11 Petitioner’s appointed counsel. Id.

### 12 III.

### 13 SUMMARY OF CLAIMS

14 As summarized below, Claim One challenges Petitioner’s conviction  
15 involving Trish B. All the other claims challenge Petitioner’s convictions involving  
16 Vanessa S.

17 Claim One: Trish B. and Detective Shumaker conspired to frame Petitioner  
18 when the real perpetrator was Bill Li. (Pet. at 2.)

19 Claim Two: The prosecutor in the Vanessa S. case engaged in misconduct.  
20 He interviewed Vanessa S. and knew she had made inconsistent statements, but he  
21 prosecuted Petitioner anyhow. (Id. at 2-4.)

22 Claim Three: The prosecutor in the Vanessa S. case violated Petitioner’s  
23 rights under Brady v. Maryland, 373 U.S. 83 (1963) by withholding a “police  
24 investigation report” that had been emailed to Vanessa S. (Id. at 4.)

25 Claim Four: Petitioner was deprived of his Sixth Amendment right to be  
26 present at trial during the Vanessa S. case, because he was not transported to court  
27 for a scheduling discussion involving the judge, prosecutor, and standby defense  
28 counsel on March 22, 2016. (Id. at 5.)



on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States.” (Emphasis added.) A habeas corpus petitioner must be in custody *at the time he files* his habeas petition. Carafas v. LaVallee, 391 U.S. 234, 238 (1968); see also Bailey v. Hill, 599 F.3d 976, 979 (9th Cir. 2010). He must also be “in custody” under the same conviction or sentence that he is attacking in that habeas petition. Maleng v. Cook, 490 U.S. 488, 490 (1989); Wright v. State, 47 F.4th 954, 959 (9th Cir. 2022) (“[T]here must be a nexus between ‘the judgment of a State court’ the petitioner is challenging and the ‘custody’ upon which the petitioner relies to establish jurisdiction. Put differently, the challenged judgment must be ‘the source of the petitioner’s custody.’”) (citations omitted).

## 2. Analysis.

As noted above, in 2020 Petitioner filed two post-judgment motions challenging his convictions in LASC case no. BA372280, the Trish B. case. The LASC denied the motion and the California Court of Appeals affirmed, noting, “The superior court appears to have treated the [second] motion as a petition for a writ of habeas corpus and denied the motion or petition on June 17, 2020 because [Petitioner] was no longer in custody for these misdemeanor offenses.” People v. Lyu, No. B306835 (Cal. Ct. App. Oct. 1, 2020). The Court of Appeal noted that Petitioner was then “serving a sentence of seventeen years on an unrelated case,” which appears to be referring to the Vanessa S. case. Id.

Additionally, in 2019 Petitioner filed a pro se civil rights case under 42 U.S.C. § 1983 in this Court raising claims related to the Trish B. and Vanessa S. cases. On January 29, 2020, the Magistrate Judge assigned to that case recommended that the claims be dismissed, noting in part, “Plaintiff has completed his sentence” in the Trish B. case. Jae Jeong Lyu v. Hight, No. 2:19-cv-05533-JVS-FFM, 2020 U.S. Dist. LEXIS 39485, at \*8 (C.D. Cal. Jan. 29, 2020).

Based on these public records, it appears that Petitioner had finished serving the sentence in the Trish B. case by 2020. This would mean that when he filed the

1 federal Petition in this case in October 2023, he was not in custody under the state  
2 court judgment related to Trish B. If so, then this Court lacks jurisdiction to  
3 consider Claim One, which challenges his convictions in the Trish B. case. If  
4 Petitioner believes that he was still in custody under that judgment when he filed  
5 the federal Petition, his response to this Order should explain why.

6 **V.**

7 **TIMELINESS OF CLAIMS TWO THROUGH NINE**

8 **A. AEDPA's One-Year Statute of Limitations.**

9 **1. Legal Standard.**

10 This habeas action is subject to the Antiterrorism and Effective Death  
11 Penalty Act of 1996 ("AEDPA"), which provides for the following limitation  
12 periods:

13 (d)(1) A 1-year period of limitation shall apply to an application for a  
14 writ of habeas corpus by a person in custody pursuant to the judgment  
15 of a State court. The limitation period shall run from the latest of –

16 (A) the date on which the judgment became final by the  
17 conclusion of direct review or the expiration of the time for seeking  
18 such review;

19 (B) the date on which the impediment to filing an application  
20 created by State action in violation of the Constitution or laws of the  
21 United States is removed, if the applicant was prevented from filing  
22 by such State action;

23 (C) the date on which the constitutional right asserted was  
24 initially recognized by the Supreme Court, if the right has been newly  
25 recognized by the Supreme Court and made retroactively applicable to  
26 cases on collateral review; or

27 (D) the date on which the factual predicate of the claim or  
28 claims presented could have been discovered through the exercise of

1 due diligence.

2 28 U.S.C. § 2244(d).

3 Thus, AEDPA generally “establishes a 1-year time limitation for a state  
4 prisoner to file a federal habeas corpus petition.” Jimenez v. Quarterman, 555 U.S.  
5 113, 114 (2009). The statute of limitations period typically runs from “the date on  
6 which the judgment became final by the conclusion of direct review or the  
7 expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).  
8 “[F]or a state prisoner who does not seek review in a State’s highest court, the  
9 judgment becomes ‘final’ [for purposes of § 2244(d)(1)(A)] on the date that the  
10 time for seeking such review expires.” Gonzalez v. Thaler, 565 U.S. 134, 137  
11 (2012). In contrast, where a state defendant seeks direct review in a state’s highest  
12 court, the judgment becomes final when time for seeking certiorari review in the  
13 U.S. Supreme Court expires. See Jimenez, 555 U.S. at 120. This is because the  
14 U.S. Supreme Court has jurisdiction over final decisions of the highest state court  
15 “in which a decision could be had” respecting a constitutional right or other federal  
16 law. 28 U.S.C. § 1257(a). To appeal to the U.S. Supreme Court, a petition for writ  
17 of certiorari must be filed within 90 days after entry of the state court judgment.  
18 U.S. Sup. Ct. R. 13.

19 **2. Analysis.**

20 As discussed above, Petitioner was resentenced in October 2017 for his  
21 crimes against Vanessa S. and then appealed. His direct appeal concluded on  
22 September 26, 2018, when the California Court of Appeal issued an order  
23 dismissing the case in response to Petitioner’s letter asking the court to dismiss it.  
24 People v. Lyu, No. B286037 (Cal. Ct. App. Sept. 26, 2018).

25 Petitioner’s conviction therefore became final ten days later, on October 6,  
26 2018, when his time to seek review in the California Supreme Court expired. See  
27 Harris v. Unknown, No. 11-cv-7511-PA (PJW), 2012 U.S. Dist. LEXIS 65232,  
28 2012 WL 1616426, at \*2 (C.D. Cal. Apr. 4, 2012) (when defendant voluntarily

1 dismisses appeal, conviction becomes final at latest ten days later, when time for  
 2 filing petition for review in California Supreme Court expires), accepted by 2012  
 3 U.S. Dist. LEXIS 65228, 2012 WL 1615232 (C.D. Cal. May 9, 2012); see Cal. R.  
 4 Ct. 8.366(b)(2)(B), 8.500(e)(1). Thus, absent tolling, he needed to file his § 2254  
 5 federal Petition one year later, on or before October 6, 2019.

6 He did not file the instant action until October 17, 2023, more than four years  
 7 after the AEDPA deadline expired. Although AEDPA provides for statutory tolling  
 8 while state court challenges to a petitioner's convictions are pending, as discussed  
 9 below, Petitioner does not appear to have enough statutory tolling to render the  
 10 Petition timely.

## 11 **B. Statutory Tolling.**

### 12 **1. Legal Standard.**

13 AEDPA provides for statutory tolling under some circumstances, as follows:

14 The time during which a properly filed application for State post-  
 15 conviction or other collateral review with respect to the pertinent  
 16 judgment or claim is pending shall not be counted toward any period  
 17 of limitation under this subsection.

18 28 U.S.C. § 2244(d)(2). The United States Supreme Court has interpreted this  
 19 language to mean that AEDPA's statute of limitations is tolled from the time the  
 20 first state habeas petition is filed until the California Supreme Court rejects a  
 21 petitioner's final collateral challenge, so long as the petitioner has not unreasonably  
 22 delayed during the gaps between sequential filings. Carey v. Saffold, 536 U.S. 214,  
 23 219-21 (2002) (holding that, for purposes of statutory tolling, a California  
 24 petitioner's application for collateral review remains pending during the intervals  
 25 between the time a lower state court denies the application and the time the  
 26 petitioner files a further petition in a higher state court).

27 However, statutory tolling "does not permit the re-initiation of a limitations  
 28 period that has ended before the state petition was filed," even if the state petition

1 was timely filed. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.), cert. denied,  
2 540 U.S. 924 (2003).

3 The burden of demonstrating that AEDPA's one-year limitation period was  
4 sufficiently tolled, whether statutorily or equitably, rests with the petitioner. See,  
5 e.g., Pace, 544 U.S. at 418; Banjo v. Ayers, 614 F.3d 964, 967 (9th Cir. 2010);  
6 Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005) (as amended); Miranda, 292  
7 F.3d at 1065.

## 8 **2. Analysis.**

9 The Court considered whether any of Petitioner's postconviction filings  
10 might create statutory tolling. As discussed above, his convictions became final on  
11 October 6, 2018. Between October 2018 and July 2019, he filed multiple motions  
12 or petitions in the LASC and the California Court of Appeal. See People v. Lyu,  
13 No. BA439082 (LASC minutes); People v. Lyu, No. B296054 (Cal. Ct. App. Mar.  
14 14, 2019). Even assuming, for the sake of argument, that he is entitled to statutory  
15 and gap tolling for all of these filings, he did not file any state court motions  
16 challenging the Vanessa S. convictions between July 9, 2019 and June 22, 2023, a  
17 gap of nearly four years. AEDPA's one-year statute of limitations expired during  
18 that time period. The postconviction petitions and motions he filed later, in 2023,  
19 cannot create statutory tolling because Petitioner's AEDPA filing deadline had  
20 already expired. See Ferguson, 321 F.3d at 823 (holding that statutory tolling "does  
21 not permit the re-initiation of a limitations period that has ended before the state  
22 petition was filed").

23 In sum, the Court does not see a record of state court filings sufficient to  
24 create the needed four years of statutory tolling.

## 25 **C. Equitable Tolling.**

### 26 **1. Legal Standard.**

27 AEDPA's one-year limitation period is subject to equitable tolling if the  
28 petitioner shows: "(1) that he has been pursuing his rights diligently, and (2) that

1 some extraordinary circumstance stood in his way’ and prevented timely filing.”  
2 Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544  
3 U.S. 408, 418 (2005)). The petitioner “must show that he has been reasonably  
4 diligent in pursuing his rights not only while an impediment to filing caused by an  
5 extraordinary circumstance existed, but before and after as well, up to the time of  
6 filing his claim in federal court.” Smith v. Davis, 953 F.3d 582, 598-99 (9th Cir.  
7 2020) (en banc) (rejecting a “stop-clock approach” to equitable tolling). In other  
8 words, “it is not enough for a petitioner seeking an exercise of equitable tolling to  
9 attempt diligently to remedy his extraordinary circumstances; when free from the  
10 extraordinary circumstance, he must also be diligent in actively pursuing his  
11 rights.” Id. at 599.

12 “The diligence required for equitable tolling purposes is reasonable diligence  
13 ... not maximum feasible diligence,” Holland, 560 U.S. at 653 (citations and  
14 quotation marks omitted), and courts consider “the petitioner’s overall level of care  
15 and caution in light of his or her particular circumstances.” Doe v. Busby, 661 F.3d  
16 1001, 1013 (9th Cir. 2011); see also Smith, 953 F.3d at 600-01 (emphasizing that  
17 the doctrine “does not impose a rigid ‘impossibility’ standard on litigants,  
18 especially not on ‘pro se prisoner litigants—who have already faced an unusual  
19 obstacle beyond their control during the AEDPA limitation period,’” but noting that  
20 it usually “requires the petitioner to work on his petition with some regularity—as  
21 permitted by his circumstances—until he files it in the district court”) (citation  
22 omitted).

23 “[T]he threshold necessary to trigger equitable tolling [under AEDPA] is  
24 very high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063,  
25 1066 (9th Cir.) (citation omitted), cert. denied, 537 U.S. 1003 (2002).  
26 Consequently, equitable tolling will be justified in few cases. Spitsyn v. Moore,  
27 345 F.3d 796, 799 (9th Cir. 2003). “To apply the doctrine in ‘extraordinary  
28 circumstances’ necessarily suggests the doctrine’s rarity, and the requirement that

1 extraordinary circumstances ‘stood in his way’ suggests that an external force must  
 2 cause the untimeliness, rather than, as we have said, merely ‘oversight,  
 3 miscalculation or negligence on [the petitioner’s] part, all of which would preclude  
 4 the application of equitable tolling.’” Waldron-Ramsey v. Pacholke, 556 F.3d  
 5 1008, 1011 (9th Cir. 2009) (citations omitted).

6 The burden of demonstrating that AEDPA’s one-year limitation period was  
 7 sufficiently tolled, whether statutorily or equitably, rests with the petitioner. See,  
 8 e.g., Pace, 544 U.S. at 418; Miranda, 292 F.3d at 1065.

## 9 **2. Analysis.**

10 Petitioner never explains why he failed to file a federal habeas petition earlier  
 11 challenging his convictions involving Vanessa S. He submitted many other pro se  
 12 filings during the intervening years, demonstrating that he had the physical and  
 13 mental ability to prepare court filings. For example, in addition to the LASC and  
 14 appellate filings discussed above, Plaintiff filed numerous pro se civil rights  
 15 lawsuits in the Central District of California. See, e.g., Lyu v. Alexa Villaneuva, et  
 16 al., case no. 5:19-cv-00637-MCS-AFM (filed Apr. 9, 2019 and dismissed Jan. 12,  
 17 2021); Lyu v. Robert Hight, et al., case no. 2:19-cv-05533-JVS-FFM (filed July 26,  
 18 2019 and dismissed Mar. 4, 2020), appeal at 837 Fed App’x 519 (9th Cir. Feb. 22,  
 19 2021) (affirmed); Lyu v. John Yutan, et al., case no. 2:20-cv-00333-JVS-AFM  
 20 (filed Jan. 13, 2020 and dismissed May 28, 2020).<sup>3</sup>

## 21 **D. Actual Innocence.**

### 22 **1. Legal Standard.**

23 Under Schlup v. Delo, 513 U.S. 298 (1995), “a credible claim of actual  
 24

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25 <sup>3</sup> The Court dismissed Lyu v. Yutan after Petitioner failed to qualify for a fee waiver  
 26 or pay the filing fee. (Dkt. 13.) Before this dismissal, Petitioner filed a motion  
 27 requesting, among other things, that his § 1983 complaint “be treated as a habeas  
 28 petition.” (Dkt. 6.) The Court denied that motion. (Dkt. 9.) The Lyu v. Yutan  
 action, therefore, does not count as a prior federal habeas petition.

1 innocence constitutes an equitable exception to AEDPA’s limitations period, and a  
 2 petitioner who makes such a showing may pass through the Schlup gateway and  
 3 have his otherwise time-barred claims heard on the merits.” Lee v. Lampert, 653  
 4 F.3d 929, 932 (9th Cir. 2011).<sup>4</sup>

5 However, “[i]n order to present otherwise time-barred claims to a federal  
 6 habeas court under Schlup, a petitioner must produce sufficient proof of his actual  
 7 innocence to bring him within the narrow class of cases ... implicating a  
 8 fundamental miscarriage of justice.” Lee, 653 F.3d at 937 (internal quotation marks  
 9 and citations omitted). While a petitioner is not required to proffer evidence  
 10 creating an “absolute certainty” about his innocence, the Schlup gateway is an  
 11 “exacting standard” that permits review only in the “extraordinary case.” Id. at  
 12 938; see also House v. Bell, 547 U.S. 518, 538 (2006) (“[I]t bears repeating that the  
 13 Schlup standard is demanding and permits review only in the ‘extraordinary’  
 14 case.”).

15 Specifically, a petitioner must show “that it is more likely than not that no  
 16 reasonable juror would have convicted him in light of the new evidence.” Lee, 653  
 17 F.3d at 938 (quoting Schlup, 513 U.S. at 327). The petitioner must support his  
 18 allegations “with new reliable evidence—whether it be exculpatory scientific  
 19 evidence, trustworthy eyewitness accounts, or critical physical evidence—that was  
 20 not presented at trial.” Id. (quoting Schlup, 513 U.S. at 324; emphasis added).  
 21 “[U]njustifiable delay on a habeas petitioner’s part,” while not “an absolute barrier  
 22 to relief,” is “a factor in determining whether actual innocence has been reliably  
 23 shown.” McQuiggin, 569 U.S. at 387.

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24  
 25 <sup>4</sup> The Schlup actual innocence exception is different than the delayed-start-date  
 26 provision for new evidence in § 2244(d)(1)(D), discussed above. Section  
 27 “2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and  
 28 dramatically less stringent (because it requires no showing of innocence).”  
McQuiggin v. Perkins, 569 U.S. 383, 395 (2013).



1 email address. If a Court order or other mail served on a pro se plaintiff at his  
2 address of record is returned by the Postal Service as undeliverable and the pro se  
3 party has not filed a notice of change of address within 14 days of the service date  
4 of the order or other Court document, the Court may dismiss the action with or  
5 without prejudice for failure to prosecute.”).

6  
7 DATED: December 20, 2023

  
KAREN E. SCOTT  
UNITED STATES MAGISTRATE JUDGE